IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,
Petitioner,

v.

CARLISLE & JACQUELIN, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE STATE OF ALABAMA, ET AL. AS AMICI CURIAE

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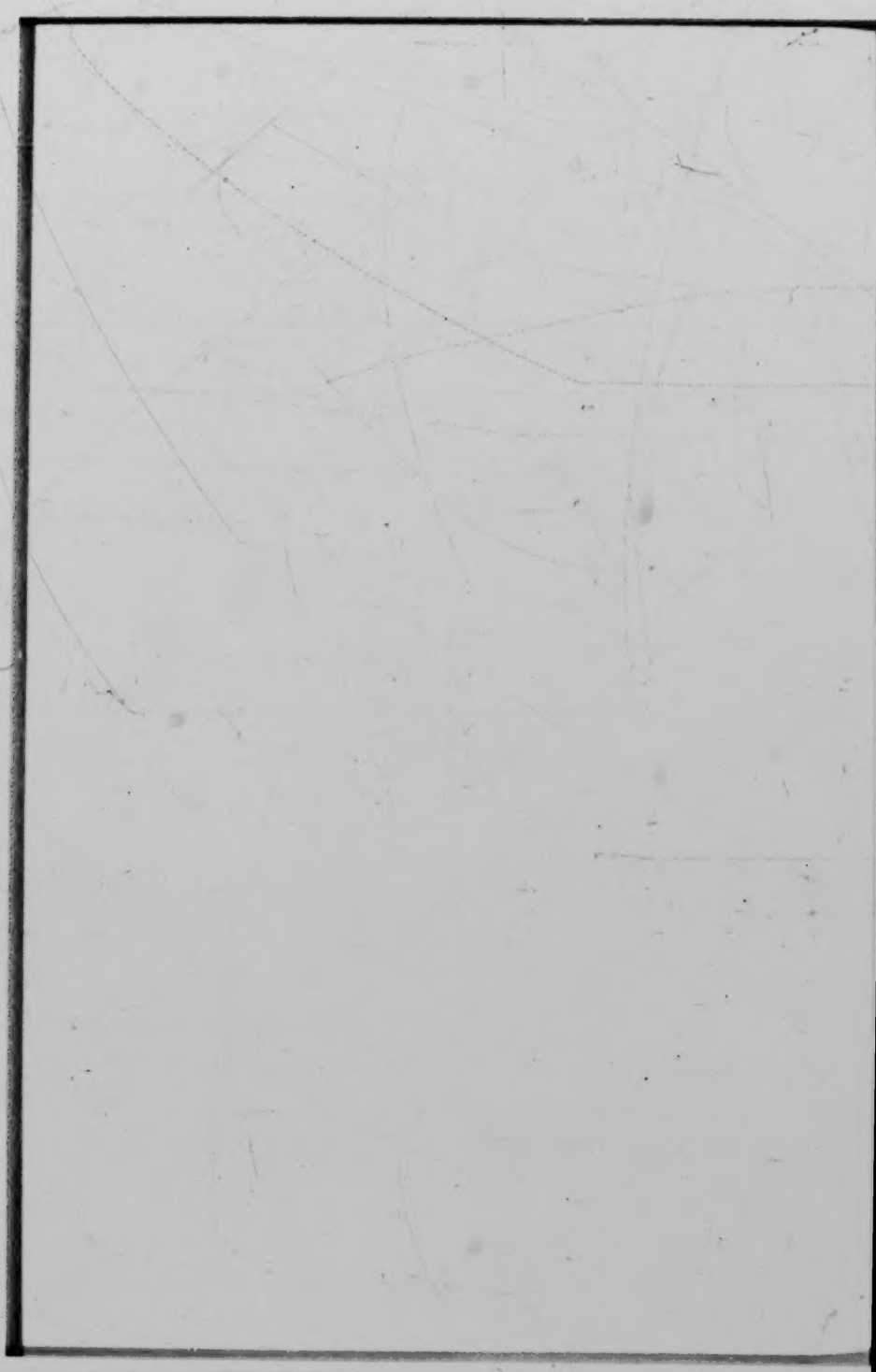

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BRIEF FOR THE STATE OF ALABAMA, ET AL. AS AMICI CURIAE

This brief is submitted pursuant to Rule 42(4) of the Court's Rules by the States of Alabama, Alaska, Arizona, Florida, Georgia, Iowa, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New York, North Dakota, Oklahoma, Rhode Island, South Dakota, Vermont, and Virginia.

INTEREST OF THESE AMICI CURIAE

During the past decade, these States, like most of the States of the Union, have been increasingly active as plaintiffs and class representatives in litigation under the federal antitrust laws. This activity has been motivated by a number of governmental interests: protection of their own budgets from the depredations of suppliers of goods and services who violate the antitrust laws; similar protection of the budgets of subordinate political entities (which receive substantial State aid); and protection, as an aspect of their role as *parens patriae,* of individual citizens victimized by antitrust violations. Such State and local government antitrust enforcement under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) not only recoups past excess charges but—at least as important—enhances the deterrent force of the inherently limited enforcement activities of the United States Department of Justice. See, *e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 130-131 (1969). The States consider such litigation essential to their welfare and that of their citizens.

Rule 23 of the Federal Rules of Civil Procedure, as amended in 1966, is a keystone of this antitrust enforcement program. The procedures established by that Rule—and particularly subsection (b)(3), which generally governs class actions seeking damages—are the foundation of the States' representation of subordinate political entities, which number in the hundreds in many States and commonly have insufficiently large claims for conventional joinder. In many instances a State's own proprietary claim is insufficient to warrant the commitment of resources required for major litigation unless the State can combine its

claim with those of subordinate entities. And consumer actions—where class members may run to many thousands if not millions in a particular State—obviously depend upon creative utilization of the procedures of Rule 23. It is these States' concern particularly with consumer class actions that prompts them to urge the Court to correct the serious distortion of the developing law under Rule 23 in the panel opinion below.

This Court's recent decision in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972)—while rejecting a Clayton Act claim for damages to a State's general economy—strongly suggested (at 266) the appropriateness of a State's representation of its consumer citizens in antitrust class actions. *State of Illinois* v. *Bristol-Myers Co.*, 470 F.2d 1276, 1278 (D.C. Cir. 1972), endorsed a State Attorney General's "common-law duty to protect the public and private purse as a matter of general welfare" and the State's consequent "standing to represent private consumers"; that court further noted with approval (*ibid.* n. 4) the certification of consumer class actions in the same litigation with States as representatives for their citizens, *In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269 (D.D.C. 1972). States have successfully served as class representatives for their citizen consumers in the various *Antibiotics* cases, *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2 Cir.), *certiorari denied sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.*, 404 U.S. 871 (1971); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278 (SDNY 1971). Each of these *amici curiae* has been a consumer class representative in the *Antibiotics* litigation (which has for the most part been settled)

and in the *Ampicillin* litigation, where trial preparation is in progress.[1]

Although the holding below would not be fatal to the consumer class actions involving prescription drugs that these States have commenced to date,[2] the panel opinion poses a grave threat not only to State

[1] Each of these States also represents a class of subordinate political entities (cities, counties, hospital districts, etc.) in these cases. In addition, they also represent governmental classes in other pending cases—*The Cast Iron Pipe Antitrust Cases*, N.D. Ala., S. Div., C.A. 71-516; *State of Connecticut et al.* v. *General Motors Corp. et al.*, N.D. Ill., E. Div. No. 71 C 830 (Automobile Fleet Discount Litigation).

It is of significance that these are no mere piggyback cases. The States' *Fleet Discount* cases were filed well before the United States began its proceedings. The United States has brought no proceeding paralleling the *Cast Iron Pipe* litigation, where a grand jury investigation was aborted. The State *Ampicillin* cases are for all practical purposes consolidated with the contemporaneous United States case, and the workload is being shared by counsel for the States and the Antitrust Division of the Department of Justice. Thus, the States as plaintiffs and class representatives have a major impact on the subject matter as well as the remedial scope of antitrust enforcement.

[2] In the group of *Antibiotics* cases involving 43 States and several cities, some 38,000 consumer claims were accepted based on purchases aggregating some $16,500,000 and it was ultimately determined that 50% of each claimant's verified purchases should be paid to cover single damages less costs. See *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (SDNY 1970); *Alabama* v. *Chas. Pfizer & Co.*, 1973 Trade Cases ¶ 74,343 (SDNY 1972). Thus, the average individual single damages exceeded $200 ($600 when trebled). Such amounts (which are also anticipated in the similar *Ampicillin* litigation) are ample to warrant the expense of individual claim determination if need be, in contrast to the conclusion below that the anticipated average claim of $3.90 would not justify the expense of individual payment.

Moreover, in the drug cases and other consumer product cases it is impossible to identify class members; thus such cases do not raise the notice problem that the *Eisen* panel found in the fact that some 2.5 million odd-lot purchasers could be identified from computer tapes.

antitrust litigation but also to other kinds of class action, whose general therapeutic effects the States heartily endorse. In particular, the panel's apparently categorical rejection of any form of classwide recovery would, if accepted, drastically diminish the compensatory and deterrent impact of "private" antitrust litigation while also encouraging violators to proliferate procedural obstacles to the determination of damages. More generally, the antediluvian approach taken to problems of notice and proof threatens to stifle the flexibility and creativity that has properly characterized the district courts' work under Rule 23 during its short life since the 1966 amendments. The panel's fundamental misconception of the nature of class actions for damages and the powers of the district courts in managing them must be corrected in the interest of the future development of this procedural tool.

We discuss the following specific questions in this brief:

(1) The court of appeals panel's misapprehension of the requirement of notice to class members specified by Rule 23(c)(2); and

(2) The propriety of classwide assessment of damages and other approaches to determination of damages that are feasible in consumer class actions.[3]

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[3] We do not deal with the court of appeals' purported retention of jurisdiction over the district court's interlocutory determinations of class action issues except to note that such interference by an appellate court with a trial court's management of an ongoing class action is inconsistent with the basic principles of flexibility and discretion that we discuss *infra*.

ARGUMENT

Because of the importance of this first opportunity for the Court to elucidate some of the major points of contention under revised Rule 23, we begin with a brief overview of the fundamental principles of the Rule and their impact upon substantive rights and liabilities. With this preface, we shall then discuss the problems of notice and proof of damages that are principally before the Court.

PREFACE—SOME UNDERLYING PRINCIPLES

It is well to remember that the class action is not a newfangled creation of the draftsmen of Rule 23 but rather, as noted in *Hansberry* v. *Lee,* 311 U.S. 32, 41 (1940), "an invention of equity" that has evolved over many years. In *Ross* v. *Bernhard,* 396 U.S. 531, 541 (1970), the Court observed that "the derivative suit and the class action were both ways of allowing parties to be heard in equity who could not speak at law," and went on, in light of the merger of law and equity, to give full meaning to the representative character of such suits.[4]

The concept of the class action was remarkably well developed as early as *Smith* v. *Swormstedt,* 16 How. (57 U.S.) 288 (1853), which upheld the right of several preachers to assert the property rights of some 1,500 of their colleagues who had seceded from the Methodist Episcopal Church. The Court summarized the then state of the law, as follows:

> "The rule is well established, that where the parties interested are numerous, and the suit is for

[4] The Court held that a stockholder as representative stands in the shoes of the corporation he represents to such an extent as to have the same right to jury trial.

> an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others * * *.
>
> * * * *
>
> "For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all [are] before the court by representation * * *."

16 How. (57 U.S.) at 302-303. See generally 3B Moore, Federal Practice ¶23.02[1]; Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 46 (1967).

Rule 23, as originally promulgated and as revised in 1966, simply formalizes, refines, and to some extent expands upon, these well established equitable procedures—now most notably making them explicitly applicable to separate claims characterized by predominant common questions of law or fact (the "(b)(3)" class action). Throughout, the Rule emphasizes the traditional representative nature of the class action. Rule 23(a) begins with the statement that "One or more members of a class may sue or be sued as representative parties on behalf of all * * *" and specifically distinguishes this procedure from joinder of parties. Rule 23(c)(2) provides that the notice required in a (b)(3) class action

> "* * * shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion * * *."

And Rule 23(c)(3) goes on to provide that

> "* * * The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include * * * those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

Thus the class action, as distinguished from joinder of claims by affirmative action of all claimants, is essentially a procedure for the representation of a group of passive potential claimants by a champion chosen by the Court, subject only to the negative right of members to disclaim the representation if they so choose after reasonable notice. In keeping with this characteristic and with the equitable nature of the procedure, Rule 23 repeatedly emphasizes the trial court's discretionary power over the structure and conduct of a class action and its obligation to use that power in supervising the representative's activities.

Rule 23 is not, of course, alone among the Federal Rules in expanding upon traditional equitable techniques. *Ross* v. *Bernhard, supra,* held that Rule 23.1 made the traditionally equitable derivative suit applicable in litigation with all of the characteristics of an action at law including trial by jury, and noted the Rules' similar development of the equitable devices of intervention and interpleader (396 U.S. at 541 n. 15). See also *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968).

It is well accepted that the procedural innovations reflected in the Federal Rules may have a substantial practical impact upon remedies available to litigants

(or would-be litigants whose rights could not be vindicated absent such procedural devices) notwithstanding the literalistic meaning that might be given to the disclaimer of the Rules Enabling Act that "[s]uch rules shall not abridge, enlarge or modify any substantive right * * *." (28 U.S.C. §2072). Indeed, Professor Hazard has recently observed that "it seems fair to say that procedure's very function is to modify the substantive law. Maitland put it that the substantive law is laid down in the interstices of procedure, and he was of course correct." Hazard, *The Effect of the Class Action Device Upon the Substantive Law,* 58 F.R.D. 299, 307 (1972).

This Court's first landmark decision under the Federal Rules, *Sibbach* v. *Wilson & Co.,* 312 U.S. 1 (1941), defined the sphere of the Rules—in the context of discovery—as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them" (at 14). *Mississippi Publishing Corp.* v. *Murphree,* 326 U.S. 438 (1946), observed—in dealing with liberalized service of process under the Rules—that "Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants" (at 445). And *Hanna* v. *Plumer,* 380 U.S. 460 (1965), held that the rulemaking power "'includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either" (at 472). Closest to home, this Court in *Ross* v. *Bernhard, supra,* noted with approval that the derivative action rule (now Rule 23.1) had in effect *created* a cause of action in a stockholder to assert a claim for injury

to his corporation under Section 4 of the Clayton Act (at 536 n. 6).

In the light of these authorities, the *Eisen* panel opinion could not justify its decision by positing as a rigid "controlling principle" that "Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation" (479 F.2d at 1014). For any procedural Rule that facilitates the assertion of claims inevitably increases the exposure of those who violate the law, and that is all Rule 23 does. The practical obstacles that more archaic procedures threw in the way of consumers' rightful antitrust claims were hardly transmogrified into violators' "substantive rights."

Another cardinal principle of federal procedure is expressed in the mandate of Rule 1 that "These rules * * * shall be construed to secure the just, speedy, and inexpensive determination of every action." This Court has recent occasion to recall the "flexibility and capacity for growth and adaptation [which] is the peculiar boast and excellence of the common law." *Colegrove* v. *Battin,* 93 S. Ct. 2448, 2455 (1973). See also, *e.g., Surowitz* v. *Hilton Hotels Corp.,* 383 U.S. 363 (1966); *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra.*

In sum, we urge the Court to decide the questions presented in this case—and to deal with the extraordinarily sweeping pronouncements of the panel opinion—in light of the axiom that the class action is a creation of equity designed to meet the need of an increasingly complex social and economic system for a method by which a representative may sue on behalf of injured persons unable to sue individually.

In Professor Hazard's words, the development of the class action—both in its equitable origins and in its refinement and expansion in Rule 23—represents an essential "attempt to provide something in the nature of a mass production remedy" for the "mass production wrongs" of modern times (58 F.R.D. at 308) and cannot be viewed "from a 19th Century perspective of substantive law. We have to view it in relation to the substantive legal problems of the 20th Century" (*Id.* at 310). A district judge with wide class action experience has said:

> "It seems to me that this matter touches on the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for the adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations, and investors who are victimized by misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce, while unwilling to grant a civil remedy against a corporation, which has benefited to the extent of many millions of dollars from collusive, illegal pricing of goods."

Weinstein, *Some Reflections On The "Abusiveness" of Class Actions,* 58 F.R.D. 299, 305 (1972). See also Fullam, *Federal Rule 23—An Exercise in Utility,* 38 J. Air Law & Commerce 369 (1972).

Opponents of class actions have sought to make much of their supposedly intolerable impact on an overburdened court system.[5] The judges on the firing

[5] See, *e.g.,* American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (1972), to which the panel opinion refers.

line disagree. The Board of Editors of the *Manual for Complex Litigation*—district judges selected because of their extensive experience in the handling of such cases—express these views in the 1973 revised edition of the *Manual,* which followed public hearings at which the views of the bar were solicited:

> "Particularly in consumer class actions, where the potential or actual class members may number in the millions, the assertion of unmanageability is typically pressed upon the court. In considering whether the proposed class action is 'superior,' the court must make a realistic evaluation of the 'other available methods,' keeping in mind the purposes for which amended Rule 23 was designed. For it is just such situations where representative treatment may be most needed, since separate suits by the many plaintiffs, or against the many defendants would pose an intolerable burden on the party opposing the class as well as the judicial system; and denial of the class action might well mean a total denial of relief as a practical matter for the persons injured.
>
> "Rule 23 grants to the court broad discretionary powers to enable the court successfully to solve the novel administrative problems posed in a class action by the unusually large number of members of the class, each of whom may have

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The objectivity of this Report is called into question by the identity of its authors, who are prominent defense counsel, and by the one-sidedness of their recommendations, which would for all practical purposes preclude consumer class actions for damages. For an opposing view, see Patrick & Cherner, *Rule 23 and the Class Action for Damages: A Reply to the Report of the American College of Trial Lawyers,* 28 Business Lawyer 1097 (1973). See also Weinstein, *op. cit. supra,* 58 F.R.D. at 306.

> small monetary claims." [*Manual for Complex Litigation* §1.43 (1973); footnotes omitted.][6]

In contrast to the cataclysmic judgments pronounced by the panel below is the language of *Wilcox* v. *Commerce Bank of Kansas City*, 447 F.2d 336, 348-349 (10 Cir. 1973), written by Senior District Judge Christensen, who is widely experienced in class actions and other major antitrust litigation:

> "Indeed the Rule [23] generally may be at the crossroads, many knowledgeable lawyers and some judges maintaining that it should be completely scrapped; others that it should be substantially revised or reformed; and still others that it should be even more liberally administered to effectuate or promote societal objectives bearing little relationship to economics or practicality. We believe that the solution may well be to continue straight ahead for a time under the present Rule, but to smooth out to a degree the formal obstacles that may be unduly obstructing trial courts on the firing line in realistic and practical applications within their sound discretion and in view of superior opportunity to observe the battle conditions case by case."

Although the class action is a venerable procedural device, its expanded utilization in damage cases under revised Rule 23 is only seven years old. Surely it is too early for any appellate court to hamper the trial courts' exploration of its equitable potentialities on the basis of abstract dogma and untested

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[6] It is also pertinent to note that past claims of an ever-rising flood of antitrust litigation are belied by the 1973 Annual Report of the Director, Administrative Office of the United States Courts, which reports a 9.5 per cent decline in the number of private antitrust cases filed in fiscal 1973.

predictions. To do so would be to retract this Court's promise of a class action remedy for widespread economic wrongs in *Hawaii* v. *Standard Oil Co., supra,* which denied a *parens patriae* damage remedy for such wrongs; the result would be no recompense at all.

I. THE PANEL OPINION MISAPPREHENDS THE FUNCTIONS OF THE INITIAL NOTICE TO CLASS MEMBERS AND IMPOSES UNWARRANTED RESTRICTIONS UPON A TRIAL COURT'S DISCRETION IN CARRYING OUT THOSE FUNCTIONS.

The panel opinion below gave no consideration to the *purpose* of the notice that it found to be "a totally inadequate compliance" with Rule 23(c)(2), except to disparage without explanation the view, attributed to the District Court, that "the first round of notices [is] * * * relatively unimportant" and is merely "envisage[d] * * * as sufficient to get the ball rolling" (479 F.2d at 1010). The opinion nowhere focused upon the language of subsection (c)(2), which contemplates nothing more than notification of class members (1) that they may "opt out" of the class, (2) that they will be bound if they do not, and (3) that they may appear through counsel if they wish; the Advisory Committee Note summarizes the purpose of this mandatory notice as "to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class," and observes generally that "In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." The panel's failure to consider the reason behind the notice requirement has, we believe, hampered its understanding of the language of the Rule. For obviously the "best notice

practicable under the circumstances" cannot be evaluated in a vacuum.[7]

The language of the Rule and the Advisory Note and the underlying principles exposed in our Preface leave no room for question that the functions of the initial (c)(2) notice in question are (1) to assist the court in assuring adequate representation of the class and (2) to permit individual recipients of the notice to decline such representation. Only the first of these functions is constitutionally required. *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940); Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 314-315 (1972), and cases cited therein. We discuss the ramifications of these two functions in inverse order.

While it might be argued in the abstract that each and every class member should be given an opportunity to "opt out" of an action that will determine his rights, the Rule itself recognizes that it is frequently impossible and inconsistent with the concept

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[7] We do not expand upon petitioner's suggestion (Br. 36-38) that the liability aspects of a consumer class action may be determined in a partial class action under Rule 23(b)(1) or (2), as to which notice is not specifically required. We note, however, that the *Manual for Complex Litigation* makes a similar suggestion, stating (§ 1.43) that "The applicability of Rule 23(b)(2) to the type of claim involving a very large class of public purchasers which may likely not all be identified seems particularly apt since, even though money damages may be involved, the disposition is in accordance with equitable principles and designed primarily to stop the violation of law by penalizing it and causing a repayment, perhaps to the public generally, of funds attributable to a violation of law." In addition, the authorities appear unanimous that backpay claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, are properly adjudicated under subsection (b)(2) without the more stringent procedural requirements applicable in (b)(3) class actions. *E.g.*, *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-802 (4 Cir. 1971).

of a class action to attempt that. Implicit in the notion of "the best notice practicable under the circumstances" is the understanding that it will often be something less than actual notice to all class members. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), from which this formula was taken, recognized that universal actual notice could not be required even where it was proposed to take something away from the individuals involved and there was no representation of their interests; *a fortiori*, something less than perfect notice is allowable where a duly chosen representative proposes to confer a benefit on members of a plaintiff class. Surely, therefore, there was no justification for the panel's *ex cathedra* statements below that notice by publication is "a farce" and that a class action should be dismissed "forthwith" if the district court cannot give notice "that could reasonably be expected to notify more than a relatively small proportion of the class" (479 F.2d at 1017).

Professor Kaplan, the Reporter to the Advisory Committee that proposed the 1966 amendments to Rule 23, expressed the view that while the interest of a (b)(3) class member in opting out to litigate on his own "can be high where the stake of each member bulks large and his will and ability to take care of himself are strong, the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 391 (1967). That the latter is true in consumer class actions is shown by the empirical evidence noted in *Berland* v. *Mack*,

48 F.R.D. 121, 129 (SDNY 1969), and by the experience in certain of the *Antibiotics* cases, where (c)(2) notices mailed to consumers at great expense resulted only in a trivial number of opt-outs.[8] The opt-out function of the notice in question is, therefore, of extremely limited real value in consumer class actions.

With respect to the role of the (c)(2) notice in testing class members' consent to the proposed representation of their interests, Professor Kaplan observed, incontestably, that

> "[When] large numbers of people are dealt with, perfect notice, while on the one hand hard to attain, becomes on the other hand unnecessary because of the probability that some individuals who are representative of differing opinions within the group (if such differences exist) will in fact be reached and will speak up."

Kaplan, *op cit. supra,* at 396. As we have noted, the Advisory Committee Note recognized the impact of the cohesiveness of the class and the effectiveness of the representation on notice requirements. While these considerations obviously vary from case to case,

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[8] Out of some 6,300,000 California residents to whom notices were mailed, only some 6,000 responded. Of these, 5,041 requested exclusion from the suit, 3,670 without giving any reasons. The opt-outs did who did give reasons indicated that they had not purchased the drugs in suit (992), could not recall whether they had made purchases or not (233) or had no records (146) and presumably most or all of the others were motivated by the same considerations. Only 6 respondents (one ten-thousandth of one percent) indicated a desire to be represented by their own counsel, and apparently none objected specifically to the representation they would be given by th Attorney General. These statistics are derived from the record in *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions,* SDNY No. M19-93A, assigned to Judge Miles Lord of the District of Minnesota.

it is apparent that the need to test the representation by notice is at a minimum in a case where the interests of large numbers of citizen consumers are being asserted by a State Attorney General elected by them. See p. 3, *supra*. And the sampling approach taken by the district court in the present case seems ideally designed as a practicable means for testing the representation where individuals seek to represent such classes.

The panel's unconsidered assumption that class members must be brought before the court at the outset of the litigation thus misreads Rule 23(c)(2) and misapprehends the basic concept of the representative suit. Moreover, it fails to recognize the distinction betwen the initial representation notice and the subsequent notice that would normally be required under subsection (d)(2) to assure the fair distribution of damages obtained by the class representative on behalf of the class members. In the latter context, each class member does have a separate individual interest in the disposition of his share of the recovery, and a more thoroughgoing notice program is normally appropriate. The *Manual for Complex Litigation* clearly articulates this distinction between the two notices (§1.45), warning, *inter alia*, that it is "a clear abuse of discretion" for the (c)(2) notice to require class members submit proofs of their claims or "opt in" by stating their intentions to submit claims; the *Manual* goes on to suggest that the appropriate procedure "most often" is for "proof[s] of claim to be submitted after a judgment establishing liability."

This Court has "called attention to the impossibility of setting up a rigid formula as to the kind of

notice that must be given; notice required will vary with circumstances and conditions." *Walker* v. *City of Hutchinson,* 352 U.S. 112, 115-116 (1956). Rule 23 similarly appeals to the discretion of the trial court managing a class action by using such open-ended terms in subsection (c)(2) as "the best notice practicable under the circumstances" and, with respect to individual notice, identification "through reasonable effort"; it is also notable that subsection (c)(2) does not prescribe the timing of the mandatory notice. Subsection (d) simply provides for additional notices as "appropriate." Thus—in contrast to the rigid approach of the panel below—the district court must be left free to tailor to the circumstances of each case the form, manner, extent and timing of notice to class members.

Petitioner's brief discusses the applicability of the "reasonable effort" touchstone to the circumstances of this case. While that element of the rule is not applicable to most consumer class actions (since it is normally impossible to identify injured consumers), other factors may call for imaginative exercises of discretion in other cases. For example, the wording and dissemination of either representation or claim notices to purchasers of consumer products should be quite different from those used in dealing with investors, who normally have some level of sophistication and may be presumed to consult the financial pages of their newspapers. Notwithstanding the disdain of the panel opinion for "full-scale campaigns on TV and radio" as some form of hucksterism out of keeping with judicial dignity, a committee of the Judicial Conference of the United States and the Administrative Office of the United

States Courts have conducted an extensive study of the utility of such contemporary media in the real world. See 4 *The Third Branch* No. 6 at p. 5 (1972, published by the Administrative Office). These media are much more effective (and potentially less expensive) means for reaching the mass of consumers than the traditional form of newspaper legal notice. See the description of the experience in certain of the Antibiotics cases in Shapiro, *Processing the Consumer's Claim,* 41 ABA Antitrust L. J. 257, 262-269 (1972).* See also June 26, 1973 circular of the Administrative Office to district judges recommending the use of radio and television; a copy is set forth in Appendix A, *infra.*

Other circumstances unique to particular cases may also warrant varying treatments of notice questions. For example, one district court has accepted the suggestion of the plaintiff class representatives in the *Ampicillin Antitrust Litigation* (D.D.C. Misc. 45-70) that notice under Rule 23(c)(2) be deferred because of the simultaneous pendency of a government injunction suit, which tolls the statute of limitations on private claims and permits (indeed requires, 15 U.S.C. §25) the court to proceed to a prompt judgment of liability in that suit; thus, neither plaintiffs' nor defendants' interests require early notice in the circumstances of that case. And petitioner's brief shows the applicability, on the facts of this particular case, of the general principle expressed in the *Manual for Complex Litigation* that Rule 23's silence "on the cost of preparing and distributing the re-

* This article contains quite detailed suggestions for the mechanics of collecting and processing consumer claims, including the use of data processing techniques.

quired (c)(2) notice" makes this "an appropriate area for the exercise of the court's discretion" (§1.45).[10]

II. THE PANEL OPINION IS PREMISED UPON AN UNDULY RESTRICTIVE APPROACH TO THE DETERMINATION AND DISTRIBUTON OF DAMAGES IN A CLASS ACTION.

The discussion below of the remedial aspects of consumer class actions is characterized more by rhetoric than by analysis—resulting in a categorical conclusion that "the 'fluid recovery' concept and practice [are] illegal, inadmissible * * * and wholly improper" and thus, apparently, that any kind of classwide approach to damages is a "fantastic procedure" that both violates Rule 23 and denies someone (apparently the defendant) due process of law (479 F.2d at 1018). We think that these problems can be considered more constructively in the light of the actual language and purposes of the Rule and a somewhat more precise analysis of the issues.

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[10] The costs of a claim-collection notice after a judgment of liability may be charged to defendants under well established principles, just as an award of litigation expenses and attorneys' fees to plaintiff's counsel is proper at that time; *e.g.*, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-390 (1970). Where necessary, defendants may also be required to finance notice at the outset by analogy, *inter alia*, to cases permitting awards of attorneys' fees even before any factual adjudication of liability. *E.g.*, *Green* v. *McDonnell Douglas Corp.*, 463 F.2d 337, 344 (5 Cir. 1972), aff'd on other issues, 409 U.S. 1036 (1973); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779, 781 (9 Cir. 1972). While a preliminary factual hearing with respect to class action issues is, we believe, normally an unwarranted disruption of the progress of the litigation, surely the panel opinion errs in holding that the district court has no *jurisdiction* to conduct such a hearing in the notice context. Moreover, a hearing to assist the court in assessing notice costs after the class action is certified is very different from a hearing with respect to the certification issue itself, which is properly condemned.

The opinion fails to distinguish between two entirely separate matters that are involved in the remedial phase of a (b)(3) class action for damages:[11] *first,* the procedure by which a judgment for damages may be obtained against a defendant, and *second,* the mode of distribution of the damages thus recovered among or on behalf of the members of the plaintiff class. In so doing, it ignores the incontestable principle that the class representative can as a *matter of procedure* obtain a judgment for damages on behalf of the class he represents—incontestable because it is set forth in the literal language of Rule 23(c)(3) that "The judgment in an action maintained as a class action under subdivision (b)(3) * * * shall include * * * those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class." Thus, any suggestion that a judgment for damages can embrace only those class members who have come forward is, as Professor Kaplan has explained, a refusal to recognize the supersession of the former "spurious class action" concept with the promulgation of Rule 23(b)(3). Kaplan, *op cit. supra,* 81 Harv. L. Rev. at 396-398. Simply put, the representative can both sue and obtain a judgment on behalf of those he represents, thereby—at least tentatively—separating the defendant from the damages he is proved to have caused

[11] As petitioner's brief notes, these matters may alternatively be treated entirely in equity (Br. 51-52). We do not elaborate on that approach here.

to the as yet unidentified plaintiff class members.[12] We fail to find anything in the *substantive* language of § 4 of the Clayton Act that precludes such a *procedure*; a "person * * * injured in his business or property" is no less a person because his name is unknown, and the damages are no less "actual" because they have been proved by a representative rather than a collection of individuals.

It is only at the second stage, when the damage judgment must be distributed among its proper beneficiaries, that the "fluid recovery" concept as properly understood comes into play, and then as only one among a number of alternative approaches available to the district court. At this point Rule 23 steps out of the picture as a literal roadmap and leaves the court to the equitable devices that inhere in the class action and, for that matter, in any civil action under modern principles.

The first step after the entry of the damage judgment is, of course, the location of as many individual class members as possible and the collection, verification and payment of their claims. We have already discussed some aspects of the notice program to be used for this purpose—which is quite properly a solicitation of claimants by the court and the class representative as its delegate. At this stage there is, on analysis, no difference between a consumer fund created by a litigated judgment and a consumer fund

[12] The amount of injury to a consumer class as a whole may often be much easier to prove than the amount of injury to a particular member, since the total amount of a manufacturer's sales can readily be determined from its business records and the overcharge resulting from an antitrust violation can then be determined by the techniques of proof developed in more conventional antitrust litigation.

created by settlement.[13] The experience of the *Antibiotics* cases shows that the claims of large numbers of consumers to an antitrust damage fund can be collected, verified and paid with reasonable efficiency and a high degree of accuracy. *State of Alabama* v. *Chas. Pfizer & Co.,* 1973 Trade Cases ¶74,343 (SDNY 1972); Shapiro, *Processing the Consumer's Claim,* 41 ABA Antitrust L.J. 257, 262-270 (1972).[14]

If the claimants who step forward do not exhaust the damage judgment entered on behalf of their class, then and only then does a question arise as to the disposition of the excess. One approach is the "fluid class recovery," by which the excess is used for the future benefit of members of the same class—typically by reducing future charges by the defendant for goods or services of the same type as are involved in the suit; the substantial body of authority in sup-

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[13] The argument that a defendant has a "right" to contest his liability to each and every class member is simply another way of claiming that the class representative cannot obtain a judgment for damages on behalf of the class he represents. The defendant has, strictly speaking, no interest in challenging particular claims unless there is some risk that he will be charged with an aggregation of claims exceeding the total classwide damages proved by the representative. The only real interests in this second phase are the interests of the class members in a fair distribution *inter sese* and the interest of the court in avoiding a fraud on the judicial system by spurious claimants. See generally *In re Antibiotic Antitrust Actions,* 333 F. Supp. 278 (SDNY 1971).

[14] This article goes on to show how it would be possible, if necessary, to litigate consumer damages on an individual basis even if a classwide damage judgment could not be obtained, using techniques such as depositions upon written interrogatories and statistical proof that are becoming increasingly commonplace. 41 ABA Antitrust L. J. at 270-273.

port of this approach is thoroughly reviewed in petitioner's brief (at pp. 43-52). Another somewhat different approach is the "cy pres" concept approved in certain of the *Antibiotics* cases, under which the excess recovery on account of pharmaceutical purchases will be used not to reduce future prices but rather to fund public health projects under State supervision. *State of West Virginia* v. *Chas. Pfizer & Co., supra,* 440 F.2d at 1091; Orders dated August 24, 1973 in SDNY No. M19-93; see Note, *Damage Distribution in Class Actions: The Cy Pres Remedy,* 39 U. Chi. L. Rev. 448 (1972). In *Antibiotics* there was no transference of funds from the defendants to some entity other than the class members injured by the violation; rather, the claim-solicitation notice notified class members that those who did not file timely claims would be deemed to have assigned any recovery attributable to them to the States for public use. The court of appeals approved this "Book-of-the-Month-Club" procedure as fair and equitable, 440 F.2d at 1091, and the different panel of the same court in *Eisen* has not explained how such a procedure has become "fantastic" and "illegal" in the interim. Surely, such creativity is not beyond the powers of a court of equity, and the *Manual for Complex Litigation* properly recommends such a procedure—without regard to whether the damage fund is created by settlement or litigation—as "within the otherwise broad discretion granted to the court by Rule 23" (§ 1.45).

The only suggestion of authority for the antipathy below to any kind of classwide judgment or utilization of funds is a citation to *Snyder* v. *Harris,* 394

U.S. 332 (1969), for the broad principle that "the claims of many may not be treated collectively or as 'the class as a whole'" (479 F.2d at 1014). We do not so read that decision, which held no more than that Rule 23 had not repealed the monetary limitations upon federal diversity *jurisdiction* long established under 28 U.S.C. §1332.[15] We cannot believe that the Court thereby intended, *sub silentio,* to confine the federal courts' *remedial* powers in the exercise of their jurisdiction to entertain antitrust claims without regard to any jurisdictional amount, especially in view of the special remedial mandate of the Clayton Act reflected in such decisions of this Court as *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 265 (1946); *Hanover Shoe Co.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 494 (1968); and *Perma Life Mufflers* v. *International Parts Corp.,* 392 U.S. 134, 138-139 (1968).

CONCLUSION

This Court's opinion seventy years ago in *Northern Securities Co.* v. *United States,* 193 U.S. 197, 351 (1904), noted that

> "Many suggestions were made in argument based upon the thought that the anti-trust act would, in the end, prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified."

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[15] *Zahn* v. *International Paper Co.,* decided December 17, 1973, takes exactly the same approach and similarly has no impact on the present issues.

So it is with the suggestions of financial ruin and "legalized blackmail" to which the panel below succumbed.

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

June 26, 1973

TO ALL UNITED STATES DISTRICT JUDGES
CLERKS, UNITED STATES DISTRICT COURTS

SUBJECT: Class Action Notices

As an alternative to the use of "franked" envelopes or penalty covers for class action mailings, particularly in actions allowed to proceed in forma pauperis, this office has developed an alternative procedure.

Under it, we maintain a list of radio and T.V. stations which volunteer broadcast time on either a public service or a news release basis to disseminate information on class actions. The use of such gratuitious public service time in circulating to the public the fact of the pendency of specific class action cases has been found to be an effective means of giving notice.

The Honorable William H. Becker, Chief Judge, U.S. District Court, Eastern District of Missouri, used notice by news media in a class action concerning constitutionality of voter registration statutes of Missouri. The case was a usual one in which the urgency of the matter made such notice truly the "best notice practicable" under the circumstances for millions of voters.

The list of stations cooperating in this project is available from our General Counsel's Office and may be obtained for any given area upon request. It is by no means exhaustive, but may well be a starting point in finding additional stations willing to cooperate.

/s/ WILLIAM R. SWEENEY
William R. Sweeney